Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

JOHN BENJAMIN WALLACE, JR.
Petitioner

v.

STATE OF ALASKA
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE ALASKA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED FOR REVIEW.

1. When National Guard Troops are used in routine state law enforcement, through the expenditure of federal monies, in direct violation of the Alaska Constitution and Alaska statutes prohibiting their use for that purpose are they deemed federalized so as to violate the posse comitatus act?

2. When National Guard Troops are used to execute the search and seizure of a private citizen's home while armed with loaded weapons in violation of the Alaska Constitution, Article III, Section 19 and in violation of Alaska Statute 26.05.070, and/or in violation of 18 U.S.C. § 1385, the posse comitatus act, does this constitute a violation of the Fourth Amendment to the United States Constitution prohibiting illegal searches and seizures?

3. When National Guard Troops are used to execute the search and seizure of a private citizen's home while armed with loaded weapons in violation of the Alaska Constitution, Article III, Section 19 and in violation of Alaska Statute 26.05.070, and/or in violation of 18 U.S.C. § 1385, the posse comitatus act, does this constitute a violation of the Third Amendment to the United States Constitution prohibiting the quartering of soldiers in time of peace without the consent of the owner of the house and a Fifth and Fourteenth Amendments to the United States Constitution which guarantee citizens of the United States the right to Due Process and Equal Protection?

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Petitioner, John Benjamin Wallace, Jr., respectfully prays a Writ of Certiorari issue to review the judgment and opinion(s) herein of the Supreme Court for the State of Alaska, filed May 5, 1999 (final denial of rehearing on 6/29/99).

IV. REFERENCE TO OPINIONS IN THE CASE.

The Judgments and Opinions as to which this Petition for Writ of Certiorari seeks review were rendered in an unpublished opinion issued by the Court of Appeals of the State of Alaska, Case No. A-5964 (Appendix at 7). Petitioner filed a Petition for Hearing with the Supreme Court of the State of Alaska on April 16, 1997. The Supreme Court of the State of Alaska granted the Petition for Hearing on August 6, 1997. The Supreme Court for the State of Alaska later issued its order on May 4, 1999, dismissing Petitioner's Petition for Hearing as improvidently granted. (Appendix at 5). The Supreme Court for the State of Alaska issued its Corrected Order on May 5, 1999, dismissing the Petition for Hearing. (Appendix at 3). Petitioner filed a timely Petition for Rehearing before the Supreme Court for the State of Alaska which was denied on June 29, 1999. (Appendix at 1).

V. GROUNDS FOR JURISDICTION/TIMELINESS OF PETITION FOR WRIT OF CERTIORARI.

This Court has jurisdiction to issue a Writ of Certiorari under 28 U.S.C. § 1257. The instant Petition for Writ of Certiorari is seeking review by the United States Supreme Court as to the findings issued by the Court of Appeals of the State of Alaska on February 28, 1997. A timely Petition for Hearing to the Supreme Court of the State of Alaska was filed on April 16, 1997 and said Petition was granted on August 6, 1997. The Petition for Hearing was subsequently dismissed as improvidently granted by the Supreme Court of the State of Alaska by Order issued May 4, 1999 and Corrected Order issued May 5, 1999.

Two of the Alaska Supreme Court Justices dissented, and found as follows:

> MATTHEWS, Chief Justice, with whom COMPTON, Senior Justice, protem, joins, dissenting. Alaska Statute 26.05.070 limits the purposes for which the National Guard may be sued. These limitations exclude the use of the National Guard for routine law enforcement. Because it appears to me that the limitations of this statute probably were exceeded in this case, and that the decision of the court of appeals is erroneous in this respect, I do not agree that the petition in this case should be dismissed.

(Appendix at 4).

A Petition for Rehearing from said dismissal was denied on June 29, 1999, and again, Justices Matthews and Compton dissented. (Appendix at 1-2.)

This Petition for Certiorari is being filed timely by mail within 90 days after the entry of dismissal of Petitioner's Petition for Rehearing to the Supreme Court of the State of Alaska. (Appendix at 1).

VI. CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED.

The case involves the Third Amendment of the United States Constitution, the Fourth Amendment of the United States Constitution, the Fifth Amendment of the United States Constitution, the Fourteenth Amendment to the United States Constitution (due process and equal protection), 10 U.S.C. § 375 and 32 U.S.C. § 112.

VII. STATEMENT OF THE CASE AND BASIS FOR JURISDICTION IN COURT OF FIRST INSTANCE.

The federal constitutional issues were presented at the Alaska Supreme Court, Court of Appeals, and Supreme Court levels.

This petition seeks review of the Court of Appeals for the State of Alaska's unpublished opinion rendered on February 28, 1997. The Superior Court of the State of Alaska denied Mr. Wallace's pre-trial motions raising said issues on January 6, 1995 and Mr. Wallace entered a plea of nolo contendere to Counts II and V of the original indictment preserving the constitutional issues pursuant to Cooksey v. State of Alaska, 524 P.2d 1251 (Alaska 1974). The conviction was affirmed on direct appeal by Court of Appeals of the State of Alaska on February 28, 1997. Mr. Wallace then filed a Petition for Hearing to the Supreme Court for the State of Alaska; initially granted on August 6, 1997, but then dismissed by Order issued on May 4, 1999 and Corrected Order issued on May 5, 1999 as improvidently granted. He then filed a Petition for Rehearing before the Alaska Supreme Court; denied on June 29, 1999. Jurisdiction for the court in the first instance was based upon indictment and/or conviction for alleged violations of the Alaska statutes.

A. Relevant Facts and Proceedings.

On June 16, 1993, Detective Ronald Robinson of the Anchorage Police Department ("APD") received an anonymous telephone call informing him that there was a marijuana grow operation located at 14201 Specking Road in Anchorage, Alaska. Detective Robinson had no information about the anonymous other than the fact that he believed from her voice that the caller was female. Detective Robinson had no information regarding the basis for the caller's knowledge, if any of Mr. Wallace, his property, or his activities.

On June 17, 1993, Detective Robinson entered onto Mr. Wallace's property through a closed gate despite the fact that "No Soliciting/No Trespassing" signs were posted on the

property. Once he had entered onto the property, the Detective claimed that he smelled growing marijuana and heard fans. Detective Robinson obtained a search warrant for 14201 Specking Road based on the above information and information regarding electrical power usage at the residence.

On June 18, 1993, Detective Robinson executed the search warrant accompanied by other APD officers and members of the National Guard who arrived in a camouflaged military truck, wore military camouflaged uniforms and brandished semi-automatic weapons.

Detective Robinson, who was in charge of the operation, did not determine whether the members of the National Guard unit had any training with respect to how and when to use their weapons. Some of the members of the unit did not even know if their weapons were loaded or not. Others had chambered weapons, with the safety off. They were not clear in their orders or instructions as to if and when they would shoot any of the "fleeing suspects" of a marijuana offense.

The entry into the residence was accomplished through a forced entry in which the back door of the residence was kicked in. The National Guard members participated in the search. A marijuana grow was found and seized. Paperwork was also seized which indicated that property at 6100 Cordova Street in Anchorage, Alaska was being leased by a person named "John Walsh".

On June 19, 1993, Detective Robinson, APD officers and members of the National Guard executed a search warrant at 6100 Cordova Street. On this date, nine members of the national guard assisted the local municipal police in the execution of the search warrant. Again, the national guard arrived in a camouflaged military truck, in black uniforms which said "Police" on the back and "Drug Eradication and Interdiction Unit" on the front, hat, and sleeves. Each national guardsman carried a drawn 9 mm. Beretta semi-automatic weapon. They forced entry, found Mr. Wallace and Mr. Don Beaujean inside. The APD officers and the members of the National Guard unit forced the men at gunpoint to lie on the

floor and the men were handcuffed. The members of the National Guard participated in the search and seizure of evidence from the premises at 6100 Cordova Street.

VIII. REASONS FOR GRANTING CERTIORARI.

A. Summary of Argument as to Unauthorized Use of The National Guard.

The rights afforded to citizens under the United States Constitution include the right to be secure in one's home, free from the proverbial "boot at the door", and in particular, "the military boot" (i.e. the forcible invasion of one's home in peace time by armed soldiers). There are sound reasons to insure that the national guard, who are not trained police officers but in essence warriors "trained to shoot and kill" should not be unleashed on the citizens of our country by the government, without the strictest statutory and constitutional controls, and only in true times of a state emergency. The recent teachings of "Waco" and Ruby Ridge" are fresh in our mind, where literally mothers and children were shot by snipers and/or burned alive. The "Kent State Tragedy", although over thirty years distant, remains equally fresh, with the horrors of college students being shot down by inadequately trained national guardsmen, loosed on the populous at a political protest. Although it may be that pursuant to Alaska statutes, the governor of the state of Alaska, has the power to call the national guard into service in actual instances of "war, disaster, insurrection, rebellion, tumult, catastrophe, invasion, or riot" or if people are acting together with intent to commit a felony by force or violence, it is patently dangerous to allow young national guardsmen, with their "finger on the trigger" to aid in serving search warrants for marijuana grow operations in an atmosphere fraught with the potential for a tragedy similar to those previously experienced by the citizens of this country. The carrying of loaded guns by police officers is a fortiori, a highly dangerous activity that calls for precise and detailed training, so that officers cannot and will not mistakenly use their weapons in an emotional and fast moving situation, to shoot citizens, in the

mistaken belief that they are authorized to do so and/or they may be endangered. Delegating this activity to national guardsmen with no police training, is a practice that this Court must halt. Insofar as the governor of Alaska has abdicated his duty, and the Alaska courts have failed to act, this Court must stop these activities. If this practice is not stopped, in all certainty blood will flow and innocent lives will be taken all under the name of the "war on drugs."

B. The Use of The National Guard For Civilian Law Enforcement Activities, Directed at Civilians With no Nexus to The Military, Absent State Law Authorizing Such Use, is a Violation of the Petitioner's Constitutional Rights Under The Third, Fourth, Fifth and Fourteenth Amendments to the United States Constitution and a Violation of 18 U.S.C. § 1385.

The use of the National Guard in this case to assist with the searches and seizures of civilians' homes and businesses and to assist with the apprehension of non-violent, individual civilian suspects was not authorized by the Alaska Constitution, the Alaska statutes or federal law and thus was a violation of Petitioner's federal Constitutional rights. The primary cause for concern raised by this situation is not the fact that federal employees might be borrowed for state service, but rather, that military personnel and equipment might be used against civilians in connection with peace-time police activities in direct violation of the Posse Comitatus Act, 18 U.S.C. § 1385. 18 U.S.C. § 1385 provides the following:

> **§ 1385. Use of the Army and Air Force as posse comitatus**
>
> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both.

(18 U.S.C. § 1385).

In this case, there was no nexus between the subject of the civilian investigation and military personnel or property, and this use of the national guard was therefore prohibited under by the posse comitatus act. Mr. Wallace and his co-defendant were both civilians. Neither Mr. Wallace's home nor the warehouse were on or near a military base. There was no evidence or indication that the marijuana would have been sold to anyone in the military. However, armed members of the Army and Air Force National Guard assisted in the search of Mr. Wallace's personal residence and the seizure of the marijuana therein, and numerous other national guard members, dressed in black DEA jumpsuits and fully armed, assisted in securing the warehouse and conducting the search and seizure of its premises.

The members of the national guard used to conduct the searches and seizures in this case were in federal service for two reasons. The first reason is that they were not authorized under the Alaska Constitution or Alaska statutes to engage in the search and seizure of a private civilian's home or business, and were therefore "federalized" in light of the fact that the national guard was not employed legally in this instance under Alaska's Constitution or statutes. The second reason is that the guard was federally funded under 32 U.S.C. § 112 when they acted in assisting the local police in the execution of a search warrant on a civilian.

32 U.S.C. § 112 is the statute through which a state receives federal funding. 32 U.S.C. § 112 does not provide the authority for use of national guard troops by the states for the purpose of drug interdiction and counter-drug activities. Further, when receiving federal funding for the national guard unit, the national guard cannot be used by a state for this, or any other purpose, when the unit is employed in direct violation of the state's Constitution and its laws.

The use of the national guard in this case was not authorized under Alaska law. Unlike the state of Pennsylvania,

Alaska has not enacted any law permitting use of the national guard in connection with the "War on Drugs." The Alaska legislature has not imbued the Governor of Alaska or his adjutant with the power or authority to call upon the national guard except in times of military-type crisis. Alaska's statute regarding use of the national guard provides in relevant part the following:

> **Governor may order organized militia into active service.** In the event of war, disaster, insurrection, rebellion, tumult, catastrophe, invasion, or riot; or if a mob or body of men act together by force with intent to commit a felony or to offer violence to persons or property, or by force or violence to break and resist the laws of the state, or the United States; or in the case of imminent danger of the occurrence of any of these events; or whenever responsible civil authorities fail to preserve law and order, or protect life and property, or the governor believes that failure is imminent, the governor may order the organized militia or part of it, into active state service to execute the laws and to perform duties in connection with them that the governor considers proper.

(AS § 26.05.070) (emphasis added). By the express language of AS § 26.05.070, there are clear prerequisites to the governor's authority to activate military forces. There must be "war, disaster, insurrection, rebellion, tumult, catastrophe, invasion, or riot," or force or violence by a "mob," a breakdown of law and order, or failure of civilian law enforcement to preserve order, or imminent danger of the occurrence of any of these events, before the governor may activate military forces.[1]

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[1] Note that in the present case, the governor of Alaska did not authorize the use of the national guard for the execution of this

There was no such sense of military urgency in the instant case. Cultivating marijuana in secret in the privacy of one's own home, or in a private warehouse, does not incite riots or the type of violence described in AS § 26.05.070 and in fact, is no more inherently violent than other illegal money-making schemes. Certainly, there was no immediate threat to the core functioning of society such that the civilian authorities could not handle the matter themselves, as they do on a daily basis. At no point in the briefing of this case at the state level did the government argue that civilian law enforcement authorities were incompetent to handle service of the search warrants in the instant case, nor was there ever an allegation or argument made that a breakdown of civilian law enforcement abilities had taken place. The designation of a policy as the "War on Drugs" to rally political support does not make for an actual war; and it is no more legal to use military force to execute this policy than it would have been to use military force to fight Lyndon B. Johnson's "War on Poverty."

Although the Alaska Constitution in Article III, Section 19 does authorize the governor to call forth the military as commander-in-chief, in order to execute the laws, suppress or prevent insurrection or lawless violence, or repel invasion, (Alaska Const., Art. III, § 19) it is clear from the language and the context of the provision that the concern of Article III, § 19 is that the governor be empowered to call upon military personnel when an emergency arises or there is a total breakdown of civil law enforcement abilities, such as is contemplated by AS § 26.05.070.

In conjunction with the fact that the use of the national guard in this case was not authorized by any Alaska Constitutional provision or by Alaska law, the guard was federally funded under 32 U.S.C. § 112 when it acted. This was acknowledged by the Alaska Court of Appeals. (State's

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search warrant at a suspected marijuana grow operation. (State's Brief to Ak Sup. Ct. at 18-20).

Brief - Court of Appeals at 22-23 and Court of Appeals Opinion at 9).

Even if the national guard is not in the service of the United States as they were in this case, the national guard are at all times subject to federal law:

> **26.05.060. Control of Alaska National Guard and Alaska Naval Militia**
>
> The governor as ex officio commander of the militia of the state has command of the Alaska National Guard and the Alaska Naval Militia while they are not in active federal service. The governor may adopt necessary regulations for them not inconsistent with 48 U.S.C. 473 - 479. Except as otherwise prescribed by those sections, the Alaska National Guard and the Alaska Naval Militia and their members are subject to all federal laws and regulations relating to the National Guard and Naval Militia of the several states and territories and of the United States.

(AS § 26.05.060).

The national guard's actions without state authority and with federal funding creates a federal use of the national guard, whose actions are reviewable by this Court. Further, this Court has both the duty and the right to review actions on the part of the legislature in violation of the United States Constitution.

1. <u>The Use of The National Guard for Civilian Law Enforcement Activities Violated 18 U.S.C. § 1385</u>.

The posse comitatus act, 18 U.S.C. § 1385, prohibits the willful use of "any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws," except in cases and under circumstances expressly authorized by the United States Constitution or act of congress. The posse comitatus

act was passed in 1878, a product of the Civil War Reconstruction Era, in response to the active employment of federal armed forces by the new republican "carpetbagger" governments of the south to maintain order and stabilize their regimes. See Jackson v. State, 572 P.2d 87, 90 (Alaska 1977). The American tradition of rejecting such use of military force to enforce civilian laws dates back to the Declaration of Independence, which lists as one of the intolerable injustices perpetrated by King George the use of his "lobsterbacks" to enforce civil laws.

18 U.S.C. § 1385 was enacted to prohibit the use of military personnel and equipment against civilians in connection with peace-time police activities. The use in this case of armed military Army and Air Force national guardsmen as a military force to assist in the searches and seizures at Mr. Wallace's home and place of business and to assist in his arrest violated 18 U.S.C. § 1385.

2. The Use of the National Guard For Civilian Law Enforcement Activities Was Not Authorized Under Federal Law.

There is no federal law authorizing the national guard's activities in the instant case. Rather, 10 U.S.C. § 375 expressly prohibits direct participation by United States military personnel in "a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law."

Furthermore, 32 U.S.C. § 112 does not provide the necessary federal authority for the use of the national guard in this case. 32 U.S.C. § 112 is merely a funding statute. It permits federal funds to be used to reimburse states for lawful use of the national guard. In United States v. Benish, 5 F.3d 20 (3d. Cir. 1993), the Third Circuit Court of Appeals expressly stated that "32 U.S.C. § 112 addresses only the requirements for federal funding and by its plain language does not govern the legality of the actions of the National Guard." Benish, at 26 (emphasis added). In Benish, the authority for the actions of the national guard was found in the

Pennsylvania statutes, at 71 Pa.Cons.Stat. § 391(e), entitled "Use of Pennsylvania National Guard for Special State Duty," which provides, in relevant part the following:

> (a) The Governor may place, or delegate authority to the Adjutant General to order, any volunteer member of the Pennsylvania National Guard or, when unavailable due to call or order into the service of the United States, any member of the Pennsylvania Guard, on special State duty to . . . support Federal , State and local drug eradication and interdiction operations and perform other necessary military duties to the extent that funds are appropriated and available for special State duty.

71 Pa.Cons.Stat. § 391(e)(a) (emphasis added). The other subsections of Pa.Cons.Stat. § 391(e) set forth reporting requirements and conditions for use of the national guard in this manner. The Pennsylvania statute is precisely the kind of state statute necessary to authorize the national guard to act in accordance with the role the federal government anticipated that it might be used for in enacting 32 U.S.C. § 112. There is no comparable Alaska statute. This, there is no federal authority justifying use of the military in the instant circumstances. (See also, United States v. Kyllo, 809 F.Supp. 787 (D. Or. 1992) in which a national guard technician was used to operate a thermal imaging device but was providing specialized technical assistance and was removed from circumstances in which he was likely to encounter civilians, as opposed to acting as an auxiliary local law enforcement officer).

3. The Appropriate Remedy is Exclusion.

Alaska Supreme Court Justice Rabinowitz issued an opinion in Kim v. State, 817 P.2d 467 (Alaska 1991) in which he and Justice Compton dissent from the Alaska Supreme Court's denial of the petition for rehearing to the Alaska Supreme Court in the case of Moon v. State, 785 P.2d 45 (Alaska App. 1990). Justice Rabinowitz argued that the appropriate remedy for a violation of 18 U.S.C. § 1385 is exclusion, stating:

> This court, of course, is without authority to enforce the penal terms of a federal act. Nevertheless, an apparent violation of the Act is not without potential remedy in a state court proceeding. That remedy is the exclusion of illegally obtained evidence.

Moon, at 471 (emphasis added). The particular use of the national guard in Moon was identical to the present case. Justice Rabinowitz stated:

> [W]here the sole targets of the investigation are civilian; where the investigation takes place entirely off any military base or installation; where the Army serves at the behest and admitted mere convenience of civil authorities; and where no military function less general than the health and efficiency of Army personnel is advanced to justify direct military participation, no exception to the Posse Comitatus Act is appropriate, and the exclusionary rule should apply "to remove incentives for governmental intrusions into protected areas," Alaska R. Evid. Commentary at 364, if not also "to breathe life" into the federal constitutional guarantees which underlie the Act, and the state constitutional guarantees which protect Alaskans from unreasonable searches and seizures. Id. at 472.

In State v. Pattioay, 896 P.2d 911, 922-923 (Haw. 1995), the Supreme Court of Hawaii excluded evidence on the basis of a violation of 18 U.S.C. § 1385 even though it found that the defendant did not have a personal, constitutionally-derived right to be "free from military involvement in the investigation of civilian criminal activity," and even though there was no evidence in the record of a pattern of violations of the posse comitatus act. The court's decision to exclude was based upon its "supervisory responsibility to ensure that tainted evidence is not utilized in criminal proceedings," id. at 925, analogizing to the "silver platter" doctrine of Elkins v. United States, 364 U.S. 206, 208 & n.2 (1960). The court held:

> Permitting only the statutory remedy expressly contemplated under the PCA would obviate the court's necessary role in supervising state criminal prosecutions and would also amount to judicial sanction of federal law violations by federal military personnel. Id. at 926.

State courts have also found exclusion to be the appropriate remedy where the violations of 18 U.S.C. § 1385 are excessive. See Taylor v. State, 645 P.2d 522, 525 (Okla. Cr. App. 1982) ("Even more offensive is [the military police officer's] active participation in the search of the appellant's house after the arrest").

In the instant case, there is also evidence of significant participation by the national guard, including searching Mr. Wallace's personal residence (Tr. 249); and of repeated and ongoing violations of the posse comitatus act. See, Harker v. State, 663 P.2d 932, 934 (Alaska 1983).

Both the national guardsmen and the Anchorage police officers involved in the searches and seizures of Mr. Wallace's residence and place of business and in securing the premises to deter or prevent his escape testified during the hearing before the Alaska trial court that the actions of the national guardsmen reflected a policy that is put into practice on a daily basis. The two guardsmen who assisted the Anchorage Police Department in searching Mr. Wallace's

residence testified that they were assigned that duty as their 40-hour a week job. One guardsman testified to having been on perhaps as many as 50 similar raids. Major Kean, the guard unit's commanding officer, testified that the program under which the Guard was operating in this case regularly employs between 25 and 80 national guardsmen. Thus, exclusion in this case is necessary both to promote judicial fairness and integrity, and to deter continuing blatant abuses of military power in violation of 18 U.S.C. § 1385.

C. The Use of National Guard Troops to Execute the Search and Seizure of a Private Citizen's Home While Armed with Loaded Weapons was in Violation of the Alaska Constitution, Article III, Section 19 and in violation of Alaska Statute 26.05.070, and/or in violation of 18 U.S.C. § 1385, the Posse Comitatus Act, and This Constituted a Violation of the Fourth Amendment to the United States Constitution Prohibiting Illegal Searches and Seizures.

The use of the armed national guard unit to execute a search warrant for a suspected marijuana grow in a situation in which there was no prior indication that any suspect would be armed or in any way violent, put all possible occupants of the premises to be searched in unreasonable danger. This use of the national guard constituted an impermissible and unreasonable search and seizure in violation of the protections provided by the Fourth Amendment to the United States Constitution.

The use of the national guard in this case raises numerous issues beyond considerations of proper authority. The testimony of the guard members at the hearing before the Alaska trial court indicated that their training is minimal, and the danger they pose is extreme. The Kent State tragedy occurred because members of the national guard fired at a crowd under circumstances that were not life-threatening, but perceived to be so by guardsmen who were insufficiently trained to properly and safely react to the situation.

In the instant case, armed members of the national guard were stationed around a warehouse where two suspects were located. If a suspect had attempted to flee through a side door and accidentally bumped into a guard member, that guard member might have shot in "self-defense." The guard members were not properly trained in the execution of a warrant in civilian law enforcement nor were they even given adequate instructions as to when they could use their weapons prior to the raid. Several of the guard members did not even realize their weapons were loaded. Finally, there is no indication that the national guard members were given any training with respect to civilian suspects' rights under the Fourth Amendment to the United States Constitution.

It is inherently dangerous to allow national guardsmen trained to engage in military activity, but with no training in police activity in a time of peace to assist local law enforcement in the service of warrants on peaceful civilians. The national guard unit in this case used loaded weapons with no specific training to ensure that they would not intentionally and/or accidentally or negligently kill private citizens in the "heat of the moment." The referenced tragedies of "Waco," "Ruby Ridge" and "Kent State" are unquestionable proof that students, children, mothers, and citizens, can be gunned down in their homes, unless the use of deadly force by law enforcement officers is only exercised with utmost care and training. The extra-ordinary use of the national guard, (i.e., part-time soldiers trained to shoot and kill with no police training) by the governor of the State of Alaska, and in this case, without the governor's approval, should be restricted to actual insurrection or other clear and present danger to the public that civilian law enforcement cannot manage as specifically required by Alaska's statutes.

Since the governor of Alaska has not acted to so restrict the use of the national guard, and has not made the specific findings necessary to use same, and has not assumed the responsibility for making such a claim, it now falls clearly upon this Court to halt this practice as it constitutes a violation of federal law and of the rights of the citizens of the state of Alaska under the United States Constitution. The alternative is

an inevitable and certain killing or maiming of citizens, by the armed troops in their homes, investigating the growing of marijuana, which in Alaska, is legal to possess. The Alaska Supreme Court held in Raven v. State, 537 P.2d 494 (Alaska 1975) that an Alaskan's possession of marijuana is constitutionally protected as to such use in the home under the specific provisions of the Alaska Constitutional right to privacy. The use of a military force to execute a warrant on a civilian, particularly in a situation in which there is no evidence that the suspects will present a danger to law enforcement and the activity itself is not inherently dangerous, constitutes an unreasonable search and seizure in violation of the protections guaranteed by the Fourth Amendment to the United States Constitution.

1. The Manner in Which the Search Warrant was Served in This Case was Violative of the Fourth Amendment to the United States Constitution.

The manner in which the search warrant was executed in this case was per se constitutionally deficient and violative of Mr. Wallace's rights to be free from unreasonable search and seizure under the Fourth Amendment of the United States Constitution in that nine members of the national guard, armed with loaded semi-automatic weapons, provided active support for local municipal law enforcement officers who served the warrant, terrorizing the occupants of 6100 Cordova, including Mr. Wallace, and assisted in the ensuing search and seizures without adequate justification or authority.

The manner in which a warrant is served must be reasonable in order to comport with Fourth Amendment guarantees that citizens will be free from unlawful searches and seizures. Generally, this issue arises in the context of "knock and announce" cases. (See United States v. Bustamante-Gomez, 488 F.2d 4, 9 (9th Cir. 1973) cert. denied, 416 U.S. 970 (1974)). When a warrant is served in an unconstitutionally unreasonable manner, the fruits of that search must be suppressed in order to deter further similar violations by the police.

The warrants obtained in this case for Mr. Wallace's residence were to be served by "Any Peace Officer." The warrants are not directed to "Any Peace Officer and Whomever He Wishes to Bring Along." There must be some authority supporting the use of armed members of the Army and Air Force National Guard to assist in securing the sites to be searched and in seizing the items discovered in this case for the manner of service to be considered reasonable. As argued supra, no such authority exists in this case. Thus, the fruits of the unconstitutionally served warrant must be suppressed.

The violations surrounding service of the warrant at 6100 Cordova Street were even more egregious, as Mr. Wallace and another person were inside the warehouse at the time and were suddenly confronted by the presence of fourteen "law enforcement officers" dressed in a manner similar to SWAT team members, bearing loaded semi-automatic weapons, who surrounded the warehouse broke down the door, used their weapons to force the men to the floor, and hand-cuffed their hands behind their backs. Counsel would hazard a guess that such a situation would cause more fear and concern to the average citizen than the more typical technical violation of the knock and announce rule.

D. National Guard Troops Used to Execute the Search and Seizure of a Private Citizen's Home While Armed With Loaded Weapons in Violation of the Alaska Constitution, Article III, Section 19 and in Violation of Alaska Statute 26.05.070, and/or in Violation of 18 U.S.C. § 1385, the Posse Comitatus Act, Constitutes a Violation of the Third Amendment to the United States Constitution Prohibiting the Quartering of Soldiers in a Time of Peace and Constitutes a Violation of the Fifth and Fourteenth Amendments to the United States Constitution Which Guarantee Citizens of the United States the Right to Due Process and Equal Protection.

The citizens of Alaska are entitled to protection under the United States Constitution, in particular, the Bill of Rights. The Alaska legislature's power to enact statutes is limited by the United States Constitution, in the present case, to the extent that Alaskan citizens are not required to entertain soldiers or allow them into their homes at all during times of peace or during times of war unless in a manner prescribed by law.

The use of the national guard to execute a search warrant on civilians in their private home and business constituted a violation of the guarantees of the United States Constitution to Due Process and Equal Protection of the Laws.

Encouraging the active participation of military reserve personnel in civilian law enforcement activities is dangerous and misguided public policy. It was quite apparent from the hearing testimony of the eight or nine national guard members involved in this incident that they had not been properly trained to act as civilian police officer. These men were in DEA uniforms positioned around a building in which civilian suspects were present, and in which civilians might have tried to escape through back doors or windows, whether as a result of guilt, fear or confusion. The guard members all carried weapons, which some guard members thought were loaded and others thought were not loaded. Still others admitted in their testimony that they had no idea whether the weapons they carried were loaded or not. Their recollections to when they would be permitted to use self-defense was spotty and

inconsistent (and in fact shockingly dangerous and fraught with the potential for a mistaken killing or maiming of a suspect or by-stander) and did not reflect an understanding of the law of self-defense.

Following extensive research on the subject, one author noted that the primary concern with the use of military for civilian purposes is due to the military members' training. "Because of their unique weaponry and training, military forces have a greater potential to cause casualties than normally equipped police forces." Locked and Loaded: Taking Aim at the Growing Use of the American Military in Civilian Law Enforcement Operations, 26 Loyola L.A. Law Rev. 1291, 1313 (1993).

The use of the military in civilian law enforcement presents an unacceptable and unconstitutional increased risk of danger to private citizens due to the fact that military personnel are trained for combat against other military forces. They are not trained for investigation and/or apprehension of non-violent civilians. The use of the military in this capacity is in direct violation of federal law and the United States Constitution and must be curtailed, if not by the state courts, then by this Court, as it is a clear violation of the 18 U.S.C. § 1385 and the United States Constitution.

In the case of Laird v. Tatum, 408 U.S. 1 (1972), this Court granted certiorari to consider whether, as the Court of Appeals held, respondents presented a justiciable controversy in complaining of a 'chilling' effect on the exercise of their First Amendment rights where such effect is allegedly caused, not by any specific action of the Army against them, but only by the existence and operation of the intelligence gathering and distributing system, which is confined to the Army and related civilian investigative agencies.

The Respondents brought a class action in the United States District Court seeking declaratory and injunctive relief on their claim that their rights were being invaded by the Department of the Army's alleged surveillance of lawful and peaceful civilian political activity. The petitioners described the

activity as the gathering by lawful means, and maintaining and using in their intelligence activities, information relating to potential or actual civil disturbances or street demonstrations.

This Court favorably quoted the Court of Appeals observations regarding the national guard's need for adequate information prior to being enlisted to assist local law enforcement agencies. In Laird, this Court approved the Army's non-intrusive compilation of information on private citizens who were thought to have potential for civil disorder as a measure if the armed forces were called into duty pursuant to 10 U.S.C. § 331. The logic of this Court in Laird holds completely true in the present case:

> [When called upon to assist local authorities] the Army is essentially a police force or the back-up of a local police force. To quell disturbances or to prevent further disturbances the Army needs the same tools and, most importantly, the same information to which local police forces have access. Since the Army is sent into territory almost invariably unfamiliar to most soldiers and their commanders, their need for information is likely to be greater than that of the hometown policeman.
>
> 'No logical argument can be made for compelling the military to use blind force. When force is employed [408 U.S. 6] it should be intelligently directed, and this depends upon having reliable information--in time. As Chief Justice John Marshall said of Washington, 'A general must be governed by his intelligence and must regulate his measures by his information. It is his duty to obtain correct information; . . ..' So we take it as undeniable that the military, i.e., the Army, need a certain amount of information in order to perform their constitutional and statutory missions.

(Laird, at 2322).

The national guard in this case was used against a private citizen without any training or information regarding civil law enforcement and procedure. No attempt was made by the local law enforcement prior to the execution of the warrant to ensure that the guardsmen would not fire on the suspects. The lack of information that the guardsmen had is shockingly evident in that, as previously noted, some of the guardsmen did not know if the weapons they were carrying were loaded.

This Court reversed the Court of Appeals decision and determined that the jurisdiction of a federal court may not be invoked by a complainant who alleges that his constitutional rights have been violated (in the Laird case, through a chilling of the exercise of rights pursuant to the First Amendment) by the mere existence, without more, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose.

In the present case, the military was enlisted in a capacity which was intrusive to a degree far beyond that of an innocuous body gathering public information on civilians. The use of the guard, in every sense, against its citizens is an activity that is so intrusive as to be constitutionally invalid.

IX. SUMMARY AND CONCLUSION.

The "war on drugs" cannot be converted into "war on citizens" using armed troops "locked and loaded" and ready to shoot on a moment's notice in the face of real and/or imagined danger. The designation of a policy as the "War on Drugs" to rally political support does not make for an actual war; and it is no more legal to use military force to execute this policy than it would have been to use military force to fight Lyndon B. Johnson's "War on Poverty." The privilege of law enforcement officers to use deadly force, must be severally and carefully curtailed, and only exercised with the utmost

discretion and training. The use of national guardsmen such as evidenced in this case is literally a "tragedy waiting to happen." Petitioner earnestly urges this Court to prevent such a tragedy so that Anchorage, Alaska, Kenai, Alaska, or other peaceful communities in Alaska, will not attain the notoriety and historical shame of "Waco," "Ruby Ridge," and "Kent State."

The Court should grant Certiorari and reverse.

Respectfully submitted this 27th day of September, 1999.

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